Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5688

TRACY LEE HUDSON, PETITIONER,

v.

THE STATE OF LOUISIANA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR CERTIORARI FILED
NOVEMBER 26, 1979
CERTIORARI GRANTED APRIL 14, 1980

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DOCKET ENTRIES

Date	Proceedings
1977	
January 4	Indictment filed by Grand Jury
March 1	Trial to Jury
March 2	Guilty Verdict Returned
March 3	Motion for New Trial filed and argued
March 7	Motion for New Trial sustained on grounds of insufficient evidence
September 30	New Trial to jury and guilty verdict returned
1978	
June 19	Louisiana Supreme Court issues opinion denying appeal relief
August 31	Rehearing denied by Louisiana Supreme Court
October 2	Application for Writ of Habeas Corpus filed with Twenty-Sixth Judicial District Court, Bossier Parish, Louisiana
November 13	Writ of Habeas Corpus argued and denied
November 20	Application for Writ of Certiorari on Writ of Habeas Corpus filed
December 8	Writ of Certiorari granted
1979	
March 9	Writ of Certiorari argued before Louisiana Supreme Court en banc
June 25	Majority and a concurring opinion issued by Louisiana Supreme Court affirming District Court denial of Writ of Habeas Corpus
June 27	Dissenting opinion issued
September 4	Rehearing denied

IN THE TWENTY-SIXTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF BOSSIER
STATE OF LOUISIANA

STATE OF LOUISIANA

v.

TRACY LEE HUDSON

No. 54,929

[1] EVIDENCE adduced on the trial of the above entitled and numbered cause, before His Honor, Graydon K. Kitchens, Jr., Acting Judge of the Twenty-Sixth Judicial District Court in and for the Parish of Bossier, State of Louisiana, on the 3rd day of March, 1977 and the 7th day of March, 1977, at Benton, Louisiana.

APPEARANCES:

ROLAND V. MCKNEELY, JR.
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for Bossier Parish

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H. C. COOPER
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Counsel for Defendant

MARCH 3, 1977

[2] THE COURT: I believe there has been a Motion for a New Trial filed and the hearing fixed this morning for the convenience primarily of the counsel for the defendant who were from out the state, and would have had to make another trip to the state next week had the matter been delayed. This is number 54,929, State of Louisiana versus Tracy Lee Hudson. Has that document been filed?

MR. COOPER: No, Your Honor. I'd ask permission of the Court to file it at this time.

THE COURT: All right, sir, you may file the motion. I believe the District Attorney, Mr. McKneely, you had indicated no objection to the hearing of this matter this morning for the purpose, or the reason stated.

MR. McKNEELY: That's correct, Your Honor.

THE COURT: Mr. Cooper, you may proceed with your presentation of argument on the motion.

MR. COOPER: Thank you, sir. Your Honor, I first want to express my appreciation to you and to the District Attorney for hearing us this quickly on the motion. I want to tell you how much I appreciate you accommodating us to hear this motion now, and also express my appreciation to the District Attorney's office by them agreeing that we could hear it now, which would save us another expensive trip here. Your Honor, insofar as the motion itself is concerned, I would first direct the Court's attention to, number one, the verdict of the jury is contrary to the law and the evidence. Your Honor, in that regard, I would submit to the Court, that the verdict of the jury, in my opinion, is—was not [3] supported by the evidence that they heard. I feel that the case presented by the state did not justify a verdict of guilty in accordance with the instructions that the Court gave the jury and the rules of law that they were to follow and apply to the facts presented to them in their reaching a verdict. Number two, I have no desire to comment on the second allegation in the motion. And I would not go to number three. And in that regard I would say to the Court that I sincerely believe that we witnessed a gross miscarriage of justice committed by the jury in this case. I feel that for some reason unknown to me and I've spent a lot of time since then trying to figure it out, I do not see how twelve people could have arrived at that verdict. I would further submit to the Court, in all due respect to Your Honor, I feel that to not to sustain the Motion for a New Trial would be to compound the travesty on justice which resulted in the verdict returned by the jury. I would say further that Your Honor

heard the testimony and the evidence, you saw the witnesses as I did, and you've been listening to me talk for about three days, so I would not comment further except to say that I would urge the Court, in all sincerity, to correct this miscarriage of justice, and grant this defendant a new trial. That's all I have to say, Your Honor.

MR. McKNEELY: May it please the Court, of course, my position is completely the opposite of that of Mr. Cooper. I point out to the Court the language of the Supreme Court of the State of Louisiana used in the case of State versus Malmay. It's been cited a number of times, it's an older case, 24 Southern Second, 869. The Court, at page 870 said, in all cases triable [4] by a jury, that jury is the judge of the evidence and while the trial judge may grant a new trial when the evidence does not support the verdict, it is not the province of the Court in such a case to determine what verdict the jury should have returned, and he should never in any case grant a new trial except when a verdict returned by the jury was prejudicial to the accused. In a very recent case, 1975, case, State versus Pryor, 306 Southern Second, 675, 1975 case decided by the Supreme Court, the case was tried in Caddo District Court, the trial jury there convicted the defendant of burglary as charged. There was one piece of evidence in that case, one piece of evidence. The jury convicted that defendant, and that defendant went to the Supreme Court claiming that that verdict was contrary to the law and the evidence. That piece of evidence was a fingerprint found on a filing cabinet on the premises that had been burglarized. That fingerprint was the fingerprint of the defendant, there was nothing further. There was no evidence of any kind whatsoever, there was no evidence of when the print was put there, even though this defendant that had been convicted had been a former employee of the establishment that operated out of those premises. The Court said that there was sufficient evidence, and the Court there discussed the circumstantial evidence business and whether, of course, there was not an eye witness to see him, but they discussed all of it, and they said that it was slim evidence in that case, I certainly admit it was

slim because the evidence we submitted to that jury was abundantly more than that, but I'm using that case as an illustration because in that case nobody saw the defendant go in, nobody saw him come out, nobody could put him there, [5] except there was his fingerprint on the filing cabinet. Now there is evidence to show that the fingerprint probably had not been there a great, great long period of time, but there was no evidence whatsoever, even the experts couldn't say that that fingerprint was even put in there on the night of the burglary. It was found the next morning, but nobody could say that it had been put on there the night before, the night before that, and the night before that, or the week before that, but obviously it hadn't been there for months because of the drying process. So I submit to the Court in that case, the Louisiana Supreme Court says that is enough evidence, did not merit a directed verdict, it was enough evidence to sustain a conviction in that case. If that's the case, if that's the status of the law of Louisiana, the evidence as presented—that's been presented here, and I won't review it, the court has heard it, is ample, not only of the evidence negativing the presence of other people around, the person had the motive, the person had the opportunity, the person who took the steps to cover up the crime as he admitted, the person who made the inconsistent statements, all that together gives ample evidence. And I submit there is no basis whatsoever for the granting of a new trial.

MR. COOPER: Your Honor, may I respond?

THE COURT: Yes, you may.

MR. COOPER: Your Honor, I am not familiar with the case that counsel quotes, but I would call this to the Court's attention. When a fingerprint is found, that's one direct evidence, not only that, but that is tantamount to the defendant leaving [6] his signature there and a written confession that he was there. I would further point out to the Court, we do not know about the facts in that case to know whether the individual who was the defendant in the case quoted by counsel, how long since he had worked for

this company that was the victim of the burglary, we do not know whether or not in his work he had access to the part of the building where the fingerprint was found, and if he had been there in his duties or would have any reason to be there. We don't know all those things. It could be that he had never been in that part of the building in his job. That may have been part of the evidence. We don't know that. But I submit to the Court that the reason that the legislature of this state added this paragraph to this statute, paragraph number three, the reason they did was to permit a Court, a Judge, to prevent a travesty on justice, to correct a ghastly wrongdoing. That was the purpose of this statute, the very reason why it is on the books. And this is a classic example of why this paragraph is needed and why Your Honor has the power to grant a new trial under these circumstances and in conformance with this statute. And I again say to the Court, that if a new trial is not granted, I submit that we would be compounding the travesty on justice which has already been perpetrated, and I would again seriously, with every fiber in my being, submit to the Court that this motion should be sustained.

MR. McKNEELY: I have only one comment to that, and that is directed to counsel's statement that the finding of a fingerprint and the testimony concerning that finding is direct evidence, which he contends, and yet he says that the testimony of eye [7] witnesses putting, not a fingerprint, not a signature, not a trademark, not any identifying item, but putting the defendant face to face with the victim immediately prior to his killing is not evidence of his having been there. That's much, much, much better testimony than the testimony of having found the fingerprint, and how long it had been there, they don't know, much, much more direct testimony.

THE COURT: I'm familiar with the Pryor case, not the law that you cited it for but for other reasons. Would you give me the citation of the other case, please?

MR. McKNEELY: The citation of the Pryor case?

THE COURT: I think I have it—give that to me, too.

MR. McKNEELY: That's—it's a different one from the Pryor that we normally—

THE COURT: How do you spell it then?

MR. McKNEELY: P-r-y-o-r. And the citation on Pryor is 306 Southern Second, 675.

THE COURT: 306, Second, 75?

MR. McKNEELY: 675.

THE COURT: 675.

MR. McKNEELY: Yes sir.

THE COURT: And the other case you cited?

MR. McKNEELY: The other case is State versus Malmay. 24 Southern Second, 869.

THE COURT: Spell Malmay.

MR. McKNEELY: M-a-l-m-a-y.

[8] THE COURT: Gentlemen, I'll state at this time that I have a very definite opinion about this motion at this moment. But under the circumstances I have not reviewed any juris prudence over the last twelve hours because I really was a little bit too tired to go to the office, but I intend to before I make a decision. I do not care to comment further until I've read some of these cases, these two in particular and others that I may find on the same subject. I believe the defendant has been remanded for sentencing until next Tuesday?

MR. COOPER: Yes sir.

THE COURT: And I will make a decision, I will notify counsel, and have the Clerk notify counsel, today is Thursday, it may be as late as Monday before I do that, but I will certainly do so not later than Monday during the day, and if possible I will render it tomorrow. I do want to read some cases before I make that decision. And I appreciate your argument and consider the matter submitted at this time.

MARCH 7, 1977

[9] THE COURT: This is State of Louisiana versus Tracy Lee Hudson, 54,929, in which on Thursday morning

of last week, with the consent of the District Attorney, a Motion for a New Trial was filed and argued so that the two out of state attorneys might not be delayed until, or have to return from Oklahoma City this week. The Motion for a New Trial contained, as I recall, I don't have it before me, but there were three, I believe there were three allegations in that motion, the first one being the verdict of the jury, the guilty verdict, murder one, is contrary to the law and the evidence, and the second had to do with the impropriety of some of the rulings by the Court on evidentiary matters, as I recall it, and the third one to the effect that even though the defendant were not entitled to a new trial as a matter of right, justice demanded a new trial, or failure to grant it would be prejudicial to the defendant, I believe I'm paraphrasing those grounds. The argument was, however, that there was no evidence presented that would have justified the jury in finding the defendant guilty as charged because there was no evidence beyond a reasonable doubt before the jury of the essential elements to prove the essential elements of the crime. The State cited two cases, which I'll refer to briefly in a moment, no cases were cited by the defendant that I recall. The Court in its charge to the jury, which I have before me, charges the elements of the crime of first degree murder are "the killing of a human being" and specific criminal intent "to kill or to inflict great bodily harm". Further charged the jury that both these elements, and I chose to call them two elements, both these elements must be proved beyond a reasonable doubt, and further in order to convict [10] this defendant of the crime charged in this case, then you must be convinced by the evidence beyond a reasonable doubt that he did, in fact, kill Wendell Gale Craig, and did so with the specific criminal intent to kill or to inflict great bodily harm. The State argued that there was evidence justifying the jury verdict. I believe that the record will reflect, of course, what each side argued, that their argument stated that there was motive and opportunity, and possibly something else, established by the evidence. I now refer to these two cases which counsel for the state relied on, State versus Pryor, P-r-y-o-r, 306 South-

ern Second, 675, and it's a 1975, January 1975 case, and I gather from the argument that the only evidence before the Court was a single fingerprint of the defendant, in that case a verdict of guilty of the charge of burglary, simple burglary, was found and the conviction was affirmed in the face of a, first a motion for directed verdict, I believe, and then also a Motion for a New Trial. That was not all of the evidence that the Supreme Court found in the record. After commenting that the evidence must prove beyond a reasonable doubt the essential elements, which they set forth as the unauthorized entry and the intent to commit a theft, they coupled the fingerprint of the defendant found on a filing cabinet with the testimony of the store owner that nobody was authorized inside that area of the building except himself and he did not leave the store unattended and when he left it he locked it, and therefore, he knew that nobody went back to that area where the cabinet was located. Further evidence—well, those two things the Supreme Court found would justify the jury in having found the unauthorized entry, fingerprints present, the storekeeper's testimony that nobody [11] could have had his authority to go back there because he just didn't permit it. No question about the theft, because a portion of the money and watches taken from the cabinet on which the fingerprint was found, so they had the proof of the essential elements. The Court made two comments, the state just bearly made out its case and they also said that as uncomfortably close as the state came to not presenting its case there were some evidence of the essential elements. The other case cited was a '46 case, State versus Malmay in 24 Southern Second, 869, which really I didn't feel was particularly pertinent. In that case the jury found a responsive verdict of negligent homicide on an indictment of manslaughter, and the argument was whether or not they could properly come up with a negligent homicide verdict, and the main holding in that case was the Judge couldn't substitute his judgment for the jury's judgment on which verdict they find when there was evidence to sustain the verdict, and that was a responsive verdict. Now, other cases, and I'm not going into the factual situa-

tion of everyone of them that I read, I don't think it is necessary, but I'll mention the name and the citation. State versus Nathan Bradley, 310 Southern Second, 582, a 1975 case, which incidentally was a judge trial, nevertheless the same law is applicable. State versus Bass, a 1975 case, in November, cited by or written by our Judge James Bolin while he was on the Supreme Court, another judge tried case, night hunting, a conviction reversed, no evidence of the essential elements of the crime. While the evidence, he commented this in his opinion, while the evidence is construed as supporting a suspicion the defendant may have engaged in this illegal activity, there is an absolute lack of [12] evidence the crime was, in fact, committed, quoting from State versus Bradley, when the state fails to prove an essential element of the crime charged a directed verdict must be granted. The same law applies as I see it, because most of these cases up two ways, first on a motion for a directed verdict, which was denied, and then a motion for a new trial on the same grounds, which was denied. State versus Williams, 323 Southern Second, 801, a December 1975 case with Associate Justice Tate writing, a man convicted of theft of property valued over $500.00, an automobile as a matter of fact, and he went into the requirement that the state proved, and found they did in the case, actually prove a theft, although the man, the defendant claimed there was a sale, payment just not been made. So the substance, and there are other cases, State versus Benson, for example, a '73 case, 284 Southern Second, 563, that's a manslaughter conviction, again the Court saying there was evidence to support all the essential elements of the crime as well as the killing was not justifiable. That was on a Motion for a New Trial. In the present case, I heard the same evidence the jury did, I'm convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of the homicide committed by this defendant of this particular victim. The only thing the Court could determine was that the jury, by some possible misinterpretation of the charge on circumstantial evidence have come up with an inference that merely because this defendant was seen in

the street the same time the victim was, shortly, and there again the time element was not established, very short time, we'll put it that way, before the victim staggered into the trailer, so the testimony was and died [13] that this must have been the person that did it. This overlooks one very important question in this Court's mind, and that is that the last person I recall testifying as having seen the defendant in the street with the victim saw two people in the street with the victim. And how they concluded that this defendant committed the act from that evidence when no weapon was produced, no proof of anyone who saw a blow struck, is beyond the Court's comprehension. The other element, of course, is the specific criminal intent to kill or to inflict great bodily harm. Having reached—I'm just having to assume because I have no idea how they reached this conclusion, so I'm having to assume that they reached the conclusion that since they concluded this defendant struck the blow, that he could not have struck such a blow without some intent to inflict great bodily harm. I think if there were grounds for their first conclusion there might be some justification for reaching the second one, but I do not find any justification for the first, therefore, I do not find how they rule from the evidence that this defendant had that specific criminal intent. For those reasons, this Court grants a new trial in this case.

MR. DeLAUNE: Your Honor, the state gives notice of its intention to request supervisory writs.

THE COURT: Very well. The Court will grant you an adequate time and I believe that twenty days would be ample time in which to perfect such application.

MR. DeLAUNE: Thank you.

[14] **REPORTER'S CERTIFICATE** (omitted in printing)

SUPREME COURT OF LOUISIANA

No. 61385

STATE OF LOUISIANA

v.

TRACY LEE HUDSON

APPEAL FROM THE TWENTY-SIXTH JUDICIAL DISTRICT COURT, PARISH OF BOSSIER, LOUISIANA. HONORABLE CECIL C. LOWE, JUDGE.

DIXON, Justice

Defendant Tracy Lee Hudson was indicted for first degree murder of Wendell G. Craig, in violation of R.S. 14:30. A jury trial was conducted and on March 2, 1977 defendant was found guilty as charged. A motion for new trial was granted by the trial judge on the ground that there was no evidence to sustain a conviction. The State's application for writ of certiorari was denied on April 7, 1977. 344 So.2d 1(La. 1977).

On retrial September 26–30, 1977 the jury returned a guilty verdict and recommended a sentence of life imprisonment without the benefit of probation, parole or suspension of sentence.

The crime occurred in a Bossier City trailer park. Several people, acquainted because the men worked together, had gathered at the mobile home of the Yorks, near the one occupied by defendant and his wife. Some were loud and very drunk (including the victim). One member of the party (who, with his wife, were the only blacks involved) had parked very close to defendant's trailer, and was noisy and slow to leave. Defendant emerged from his mobile home, remonstrated and argued with the black who became distressed and drove off without the victim, who was depending on him for a ride home. The victim and the defendant then argued. The defendant testified that his wife suddenly terminated the argument by stabbing the victim. The defendant and his wife then withdrew to their mobile home. Defendant said the victim continued to make loud

noises outside for awhile, but that it became quiet. The Yorks testified that the victim made his way back to their mobile home and fell dead on the floor.

On appeal, defendant relies upon three assignments of error for reversal of his conviction and sentence.

ASSIGNMENT OF ERROR NO. 1

By this assignment, defendant contends that the trial court erred in failing to sustain his motion to suppress the testimony of a State witness, Dennis Plunkett, or in refusing to allow an evidentiary hearing in support of defendant's motion.

Defendant sought to exclude the testimony of the witness on the ground that the State had not acted with "clean hands." Defendant alleged in argument on the motion that he would attempt to show, by way of an evidentiary hearing, that the witness was served a subpoena by the sheriff's office, and that there was no subpoena or return on the subpoena filed in the record in the clerk's office. He argues that, although the identity of State witnesses is not normally discoverable (see, e.g., State v. Thornton, 351 So.2d 480 (La. 1977)), as a practical matter, that information becomes available on the public record when subpoenas and returns on subpoenas are filed with the clerk of court. Plunkett was an important witness—the only one to testify that he had seen Tracy Hudson stab Craig. Plunkett had not testified at the first trial, although he said he had given his name to the investigating police. The prosecutor interviewed Plunkett for the first time a few weeks before the second trial.

Even if it could be shown that the State acted with impropriety (we find none), defendant has failed to show he was prejudiced by not discovering the witness' identity earlier. Defense counsel became aware of the State's intention to call Plunkett after the jury was chosen, and then indicated to the court he had been caught by surprise. The trial was recessed until the next morning, and the trial judge excused the other witnesses to give defense counsel an opportunity to interview Plunkett before the

resumption of trial the next day. It is apparent that defendant had the opportunity to complete trial preparation before any witnesses were called.

There is no merit to this assignment.

ASSIGNMENT OF ERROR NO. 2

Defendant contends the trial court erred in sustaining the State's objection to certain testimony of Ms. Sonya Peters, defendant's attorney, during the first trial.

At defendant's first trial, less than seven months earlier, he had been represented by two lawyers from Oklahoma. (Defendant was a horse trainer, had been a resident of Louisiana for only a short time, and had previously lived in Texas and Oklahoma). The Oklahoma lawyers associated Sonya Peters, a Shreveport lawyer, to assist them in the trial. According to defense counsel, Ms. Peters was prepared to testify that, in preparation for the first trial, she was told by one of the Oklahoma lawyers that Helen Hudson, defendant's wife, had said she was the one who stabbed Craig and that Helen Hudson admitted to Ms. Peters that she was, indeed, the one who stabbed Craig.

In State v. Gilmore, 332 So.2d 789 (La. 1976), we recognized that evidence that another person had admitted doing the act for which defendant was on trial and was not inadmissible even though it was hearsay (evidence of a statement made out of court, offered to show the truth of matters asserted therein; State v. Martin, 356 So.2d 1370 (La. 1978)).

We recognized in the Gilmore case that such an extrajudicial statement admitting the commission of a crime fell within the exception to the hearsay rule as an admission against the defendant's penal interest. The source of credibility for the out-of-court admission is the assumption that a person normally would not admit the commission of a crime if it were not true.

If the person who is said to have made the prior admission is present as a witness against the defendant, he is

subject to cross-examination on the matter of his prior admission; if he denies making it, evidence of his out-of-court declaration is admissible. R.S. 15:493. In such case, all the parties with knowledge are before the court, and the jury can make the factual finding based on testimony. Where, however, the person who is said to have made the proir confession is not before the court, the chance of fabrication of testimony that another has confessed increases, and its reliability diminishes. Where, however, the defendant has made known his belief that another has confessed, and has diligently sought the attendance of that person at trial to prove his admission, only to be thwarted by the death (State v. Gilmore, supra) of the witness, or by his refusal to incriminate himself (see, e.g., Sutter v. Easterly, 162 A.L.R. 437, 444, 189 S.W.2d 284 (1945); U.S. v. Mulholland, 50 F.413 (D.C. 1892); see also State v. Morrow, 260 La. 72, 78, 255 So.2d 78 (1971) (Summers, J. dissenting); cf. State v. May, 339 So.2d 764, 770 (La. 1976)), indicia of the genuine character of the defense is present. The rule developed that, if the out-of-court declarant were "unavailable" as a witness, testimony that the missing person had made the admission against penal interest is admissible.

Here defendant never revealed that his wife had confessed until the trial itself. She had testified at the first trial, apparently to the effect that she was present and her husband did not stab the deceased. Defendant testified that he did not stab the victim. At his second trial, he explained the failure of his wife and himself to reveal her as the culprit by the assertion that no one asked either of them if his wife had done the act. The only evidence in the record about the whereabouts of Helen Hudson at the time of the second trial is the testimony of defendant, who said he had not seen or heard of or about his wife since she left the courtroom after the first trial seven months earlier. There is no evidence of any effort to locate her or to obtain her presence at trial.

Although defendant was an indigent at the time of the second trial, and represented by the indigent defender, it

is hardly conceivable that the aid of law enforcement officials could not have been enlisted to locate one who confessed to stabbing another to death.

Wigmore explains that the purpose and reason of the hearsay rule is the key to the exceptions to it. 5 Wigmore on Evidence, § 1420 (Chadbourn rev. 1974). The hearsay rule is based upon its unreliability, and the first principle supporting exceptions to the hearsay rule, Wigmore says, is the "necessity" principle; that is, the witness whose out-of-court declaration is needed is dead or *otherwise unavailable*, making necessary the introduction of the hearsay testimony.

The record before us does not demonstrate that the first principle of the exceptions to the hearsay rule has been satisfied. The unavailability of Helen Hudson has not been demonstrated. The circumstances of her absence tend to show the *unreliability* of her purported admission that she stabbed Craig. We cannot conclude, from the absence of evidence about efforts to obtain the presence of Helen Hudson for trial, that defendant was relegated by necessity to the use of hearsay testimony.

Proof of Helen Hudson's unavailability was essential to bring the testimony of Ms. Peters within the exception to the hearsay rule.

There is no merit to this assignment.

ASSIGNMENT OF ERROR NO. 3

Defendant contends that the trial court erred in denying his motion for new trial which alleged that the verdict is contrary to the law and the evidence (C.Cr.P. 851 (1)), and the interests of justice would be served by granting a new trial (C.Cr.P. 851 (5)). Specifically, defendant raised the same allegation as in Assignment No. 1 (see that discussion above). In addition, he contended that the testimony of Dennis Plunkett, the only alleged eyewitness to the stabbing, was perjured and should be disregarded; therefore, he argues that there was *no* evidence upon which a verdict of guilty could have been based and a new trial should have been granted.

Several witnesses testified that they saw defendant arguing with the victim prior to the stabbing, but none, other than Plunkett, stated that they actually saw defendant stab Craig. Plunkett was not called to testify at defendant's first trial (the witness himself stated that he gave his name to a police officer as a witness "but my name got lost somewhere"). Plunkett testified that while he was visiting a friend, Michelle Davenport, who lived in the same trailer park where defendant lived and where the incident took place, he saw Lori Miramontz run over the the Davenport trailer and overheard her saying that two men were arguing and fighting. According to Plunkett, at that point he jumped a fence behind the defendant's trailer and arrived on the scene in time to see the defendant stabbing Craig.

Defendant alleges that Plunkett's testimony varies to such an extent from that of Lori Miramontz and Joy Heath that he must have committed perjury on the stand and his testimony should be disregarded. The testimony is conflicting in certain regards; however, the conflict does not reach the extent that it must be concluded that Plunkett's testimony was perjured. Compare State v. Ellender, 354 So.2d 500 (La. 1978), where eight defense witnesses testified in direct conflict (and it was stipulated that nine more defense witnesses would so testify) to the testimony of a State witness which testimony was crucial to a determination of the defendant's guilt or innocence.

From Lori Miramontz' testimony on direct examination it appears that she and Joy Heath observed defendant and Craig arguing in front of a trailer owned by Mr. and Mrs. Russell York, left before anything further happened, returned to the York trailer where she saw the injured Mr. Craig, and ran to the Davenport trailer where she asked Michelle Davenport to call the police. She testified that she did not see Plunkett until she got to the Davenport trailer. The testimony became confused, however, in redirect when she stated she went to the Davenport trailer after "the argument" but did not specify that it was after Mr. Craig had been stabbed. Joy Heath's testimony was

basically to the same effect and indicated that she and Lori did not go to the Davenport trailer to make a phone call until after the stabbing had occurred which was the first time she saw Plunkett.

In any event, defendant exploited the inconsistency in closing argument in an apparent attempt to convince the jury to disbelieve Plunkett's testimony. When a conflict in testimony arises as to a factual matter, such as this, the question of the credibility of the witnesses rests within the sound discretion of the trier of fact. That factual determination will not be disturbed on review unless clearly contrary to the evidence. See, e.g., State v. Cobbs, 350 So.2d 168 (La. 1977); State v. McSpaddin, 341 So.2d 868 (La. 1977); State v. Alexander, 328 So.2d 144 (La. 1976).

This assignment is without merit.

The conviction and sentence are affirmed.

26TH JUDICIAL DISTRICT COURT
BOSSIER PARISH, LOUISIANA

STATE OF LOUISIANA

v.

TRACY LEE HUDSON

APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE, THE TWENTY-SIXTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF BOSSIER, STATE OF LOUISIANA:

The petition of Tracy Lee Hudson respectfully represents:

1.

Petitioner is being held in the Bossier Parish Jail by Sheriff Vol Dooley, Sheriff of Bossier Parish, State of Louisiana.

2.

Petitioner was indicated by the Bossier Parish Grand Jury by indictment filed January 4, 1977, charging petitioner with first degree murder, all of which will be more fully shown by reference to the indictment filed in these proceedings.

3.

Petitioner was first referred to the 26th Judicial District Indigent Defender Board for representation.

4.

Subsequently, petitioner employed his own counsel, namely, H.C. Cooper and Sonia Peters.

5.

On March 2, 1977, defendant, after trial, was found guilty as charged, all of which will be more fully shown by reference to the minutes of this cause.

6.

The defendant, through his counsel, on March 3, 1977, filed a motion for a new trial. This Honorable Court, on March 7, 1977, for reasons set forth in an oral opinion by Judge Enos C. McClendon, Jr., which are referred to and made a part hereof by reference, granted a new trial in the State of Louisiana on March 7, 1977, on the grounds that the evidence adduced was legally insufficient to support a conviction of first degree murder.

7.

Defendant was tried again and convicted and sentenced to life imprisonment without benefit of probation, pardon, or parole.

8.

The defendant's conviction and sentence herein were illegal, unconstitutional, and must be set aside for the following reasons:

9.

Petitioner is in custody by virtue of a sentence for an offense for which he could have successfully pleaded double jeopardy, but did not do so, to-wit, that in the matter entitled State of Louisiana v. Tracy Lee Hudson, Number 54,929 of the docket of the 26th Judicial District Court, Parish of Bossier, State of Louisiana, petitioner was in jeopardy for the same offense within the meaning of Title XVIII, Code of Criminal Procedure, as he was in the trial of the offense for which he was convicted and sentenced and is now being held in custody.

10.

In the recent case of *Burks v. U.S.*, 98 S. Ct. 2141 (June 14, 1978), the Supreme Court of the United States held that as a matter of constitutional law, Amendment 5 to the Constitution of the United States "*forbids a second trial for the purpose of affording the prosecution another op-*

portunity to supply evidence which it failed to muster in the first proceeding." (Underlining added for emphasis).

11.

The Supreme Court, in *Burks v. U.S., supra,* held specifically that "*The double jeopardy clause precludes a second trial, once the reviewing court has found the evidence legally insufficient,*" and "*the only judicial remedy available for that court is the direction of a judgment of acquittal. To the extent that our prior decisions suggest that by moving for a new trial defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled.*" (Underlining added for emphasis.)

12.

Pursuant to Louisiana Code of Criminal Procedure, Article 362(6), the defendant must be discharged.

13.

Subsequent to defendant's conviction herein, the Supreme Court of the State of Louisiana ruled in the case of *State of Louisiana v. Aaron Payton,* Number 62,338, decided July 3, 1978, that *first degree murder must as a matter of constitutional law, contain at least one of the five aggravating circumstances as enumerated in State v. Payton (supra).* (Underlining added for emphasis.) The Court therein clearly states:

> "The sum of the legislative and judicial action limits capital murder to specifically intended homicides committed in five situations:
> 1) murder committed in the course of aggravated rape, aggravated kidnapping, aggravated burglary, armed robbery, or attempts to commit these crimes;
> 2) murder of a fireman or peace officer engaged in his lawful duties;
> 3) murder by which the offender knowingly created a risk of the death or great bodily harm to more than one person;

4) murder committed for remuneration;
5) murder committed by a prison inmate while serving sentence for a felony.
Any other specifically intended homicide constitutes second degree. murder (emphasis added, slip op. p. 13)."

14.

The evidence presented in the trial of this cause is totally devoid of any proof of aggravating circumstances; therefore defendant's indictment, conviction, and sentence were constitutionally defective in accordance with the decision of the Louisiana Supreme Court in *State of Louisiana v. Aaron Payton, (supra).*

15.

Because of the failure of the proof to establish the constitutionality essential aggravating circumstances, defendant's conviction and sentence was without due process of law; therefore, pursuant to the Louisiana Code of Criminal Procedure, Article 362(9), the defendant must be discharged.

WHEREFORE, PETITIONER PRAYS THAT:

1. A Writ of Habeas Corpus issue herein to Sheriff Vol Dooley, Sheriff of Bossier Parish, State of Louisiana, to produce in Open Court, at such time and on a date to be fixed by this Honorable Court, petitioner herein, Tracy Lee Hudson, the person unlawfully confined, and then and there a true and correct return make of the reason and cause of the detention of petitioner.

2. After due proceedings had, petitioner be discharged and released from further detention and confinement, and all such orders issue which are necessary and proper in the premises and to which he may be entitled.

S. PATRICK PHILLIPS
Chief Assistant Indigent Defender
Office of the Indigent Defender
405 Bossier Parish Courthouse
Benton, Louisiana

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF BOSSIER

BEFORE ME, the undersigned authority, Notary Public in and for the Parish and State aforesaid, personally came and appeared: TRACY LEE HUDSON, who, after being duly sworn, stated that:

All of the allegations contained in the foregoing application for a Writ of Habeas Corpus are true and correct to the best of affiant's information and belief.

s/ TRACY LEE HUDSON

SWORN TO AND SUBSCRIBED before me this 29 day of Sept., 1978.

s/ ERNESTINE LEE
NOTARY PUBLIC

ORDER

Considering the foregoing petition,

IT IS ORDERED that a Writ of Habeas Corpus issue herein, directed to Sheriff Vol Dooley, Sheriff of Bossier Parish, Louisiana, commanding him to bring the body of Tracy Lee Hudson before this Court at 9:30 o'clock, a.m., on the 10 day of Oct., 1978, in the Criminal District Courtroom, Courthouse Building, Benton, Louisina, and then and there, together with any and all other persons having an interest in these proceedings, state by what authority the said Tracy Lee Hudson is held in custody.

BENTON, LOUISIANA, this 29 day of Sept., 1978.

s/ LOTT PODGETT
JUDGE, 26th Judicial District Court
Bossier Parish, Louisiana

**IN THE TWENTY-SIXTH
JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF BOSSIER
STATE OF LOUISIANA**

State of Louisiana
Vs. No. 54,929

DATE OF ORDERS	ORDERS OF COURT
10/10/78	Application for writ of habeas corpus is continued to October 17, 1978.
10/17/78	Application for writ of habeas corpus is continued to November 13, 1978.
11/13/78	Defendant is in open Court, represented by counsel, Pat Phillips from Indigent Defender Board and Richard Burst. Application for writ of habeas corpus is called. Complete record in these proceedings is filed in the record. Writ is argued and denied. Defendant gives notice of intention of applying for writs to La. Supreme Court and is given 15 days to perfect writs.

IN THE TWENTY-SIXTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF BOSSIER
STATE OF LOUISIANA

No. 54,929

STATE OF LOUISIANA

v.

TRACY LEE HUDSON

[1] RULING OF THE COURT on WRIT OF HABEAS CORPUS of the above entitled cause, before His Honor, Cecil C. Lowe, Judge of the Twenty-Sixth Judicial District Court in and for the Bossier, State of Louisiana, on November 14, 1978, at Benton, Louisiana.

APPEARANCES:

PATRICK PHILLIPS
Indigent Defender Board
Counsel for the Defendant
Courthouse
Benton, Louisiana

RICHARD BURST
209 E. Oklahoma Street
Guthrie, Oklahoma 73044
Assistant Counsel for Defendant

ROLAND MCKNEELY
Assistant District Attorney
Bossier Parish, Louisiana

[2] THE COURT: Gentlemen, I think in all fairness to everyone, this I indicated to you in chambers that I would try to rule on this matter as soon as possible, because one of you would be applying for writs. I want to give you an opportunity to do so as soon as possible. I may as well, in order to not delay this matter—I have read your brief, I've heard Mr. McKneely's argument. In reading the brief and I realize in this particular case there are striking

similarities with Burks and in one matter in connection with this case there was evidence that was not presented at the first trial. At the time of the first trial and the ruling of the Trial Judge, after the jury had returned its verdict, a new trial was granted. That was the vehicle that was available to the defendant to grant him relief for whatever matters within the discretion of the Judge and within the code would be his reason for granting a new trial and if he did not, of course, then there would have been the—the defendant would have had a right to appeal. The Judge, in his discretion, did grant a new trial to the defendant. The State of Louisiana took writs, the Supreme Court denied those writs and I can't anticipate their reasons or anything else, except to say as the proper vehicles there, that was a matter under our law at that time that they considered, I would assume, that was within the discretion of the Trial Judge and if it had been the law of our State, that the ruling of the Trial Judge in view of the jury's finding, I think that those writs would have been granted immediately because if that was the view point that would have ended the matter of the Trial Judge. It was just another vehicle in our way of procedure at that time and a new trial was granted in this matter as this record will reflect. A jury returned a verdict of guilty and an application for a new trial was made [3] and denied, the case was appealed to the Supreme Court and affirmed by the Supreme Court. The Burks case and the reference therein was a Federal Case and it was dealing with a Federal Appellant Court's decision as to the burden of proof that the Appellant Court found the State did not hear once the particular defense had been raised in that case. It is pointed out in Burks that there was no appeal of the Appellant Courts ruling. In Burks then, we weren't exactly dealing with two trials, we were dealing with one trial that has been appealed and an attempt to try another one. This case has gone through the Courts, new trial granted and that trial has been completed. The trial was conducted, a new trial was granted, rulings made and the trial was conducted under the laws then existent of our State and for these reasons I am going to deny the writ. I am going to

deny the application. Now you want to take--I'm going to give you, pursuant to our conference inasmuch as the defendant will be agreived by this decision there is fifteen days to apply for writs as to the Court's denial of this motion.

MR. PHILLIPS: If it please the Court, we will at this time give the Court verbal notice of intention to apply to the Louisiana State Supreme Court for supervisory writs and I believe the Court has fixed the delay of fifteen days.

THE COURT: Right, the record will reveal your notice of intention to apply for writs and the Court will grant you fifteen days in which to perfect those writs.

MR. PHILLIPS: Thank you sir.

[4] **REPORTER'S CERTIFICATE** (omitted in printing)

SUPREME COURT
STATE OF LOUISIANA

STATE OF LOUISIANA

v.

TRACY LEE HUDSON

NUMBER 54,929 ON THE CRIMINAL DOCKET OF THE TWENTY-SIXTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF BOSSIER, STATE OF LOUISIANA, HONORABLE CECIL C. LOWE, JUDGE

APPLICATION FOR
WRIT OF CERTIORARI ON WRIT OF HABEAS CORPUS

TO THE HONORABLE, THE SUPREME COURT OF THE STATE OF LOUISIANA:

STATEMENT OF THE CASE

On January 4, 1977, petitioner, Tracy Lee Hudson, hereinafter referred to as "petitioner", was charged with First Degree Murder in the District Court in and for the Twenty-Sixth Judicial District, Parish of Bossier, State of Louisiana, Criminal Docket Number 54,929; on March 2, 1977, petitioner was found guilty; on March 7, 1977, the Honorable Enos C. McClendon granted a new trial on the grounds that the evidence presented by the state was insufficient to sustain the verdict of guilty. The Supreme Court of Louisiana upheld that decision. *State* v. *Hudson*, Louisiana, 344 So. 2d, 1 (1977).

Petitioner was retried and was found guilty on September 30, 1977; on June 19, 1978, the Supreme Court of

Louisiana issued an Opinion, Case Number 61385, affirming the conviction; on August 31, 1978, rehearing was refused. On June 14, 1978, while petitioner's appeal was pending in this court, the Supreme Court of the United States held in *Burks* v. *United States*, 98 S. Ct. 2141 (1978) that as a matter of substantive constitutional law, the double jeopardy clause of the Fifth Amendment to the United States Constitution *prohibits* the retrial of a defendant when his original trial resulted in a decision that the evidence adduced therein was legally insufficient to sustain a conviction.

On October 2, 1978, petitioner filed an Application for Writ of Habeas Corpus, alleging the illegality of his second trial on the grounds that it constituted a violation of the double jeopardy prohibition of the Fifth Amendment to the Constitution of the United States.

After hearing, before Honorable Cecil C. Lowe, Judge, Twenty-Sixth Judicial District Court, Bossier Parish, Louisiana, petitioner's application for writ of habeas corpus was denied.

GROUNDS FOR SUPERVISORY JURISDICTION

Jurisdiction vests under the provisions of Article 5, Section 5 of the Constitution of the State of Louisiana, granting the Supreme Court of Louisiana control of, and general supervisory jurisdiction over, all inferior courts; Rule 10, Section 5 of the Louisiana Supreme Court Rules; and Article 369 of the Louisiana Code of Criminal Procedure. For the reasons herein stated, this Honorable Court should exercise its jurisdiction.

The ruling or judgment of the Honorable Cecil C. Lowe, Judge, of the Twenty-Sixth Judicial District Court, Bossier Parish, Louisiana, to-wit:

Denial of petitioner's release on the Writ of Habeas Corpus was a final judgment herein, but is not appealable under C. Cr. P. Art. 369.

THE ISSUES

1. Sustaining of motion for new trial on insufficiency of evidence is bar to further prosecution for same offense under Fifth Amendment double jeopardy clause.

2. Failure to plead former jeopardy prior to second trial is not waiver since, one, a plea of double jeopardy may be raised at any time, and, two, the plea would have been of no avail under then existing Louisiana law.

ASSIGNMENT OF ERROR

The Court erred in failing to find that the second trial of petitioner, Tracy Hudson, violated the double jeopardy clause of the Fifth Amendment of the United States Constitution.

ARGUMENT

Sustaining of Motion for new trial on insufficiency of evidence is bar to further prosecution for same offense under Fifth Amendment Double Jeopardy clause.

The United States Supreme Court in *Burks* v. *United States*, 437 U.S. ___, 98 S. Cit. 2141, ___ L. Ed. 2d, ___ (1978) clearly stated:

> "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks*, 2147

In the case at bar, the essential testimony supplied in the second trial that was not present in the first was the testimony of an eyewitness who stated that he had told the policeman at the scene that he had observed the crime; but his name got lost for about ten months until the second trial (Second Trial Tr., p. 215). Although there are many unanswered questions concerning the obtaining of this missing eyewitness, such unanswered questions are not germane to this petition; what is germane is that the state had an opportunity to present this testimony in violation of the petitioner's Fifth Amendment privilege against being twice placed in jeopardy for the same offense; hence,

the State of Louisiana was afforded ". . . another opportunity to supply evidence which it failed to muster in the first procedure." *Burks*, supra 2147.

The discussion of the *Burks* decision thus far is preliminary and certainly not new to this Honorable Court; that is, that a man cannot be twice placed in jeopardy; however, the holding of the *Burks* decision which is most pertinent to the instant case and which most significantly changes the application of the Fifth Amendment Double Jeopardy Clause is that once a reviewing court has found the evidence legally insufficient, the Double Jeopardy Clause *precludes a second trial*, and the fact that a defendant has made a motion for a new trial is not a waiver. The Supreme Court in *Burks*, at page 2150, stated:

> "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person "waives" his right to a judgment of acquittal by moving for a new trial . . . Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only "just" remedy available for that court is the direction of a judgment of acquittal. *To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled.* (Emphasis added.)

Likewise, it must be recognized that *Burks* renders inoperative and unconstitutional that portion of La. Code Crim. Pro. Ann., Art. 591, which is emphasized as follows:

> No person shall be twice put in jeopardy of life or liberty for the same offense, *except, when on his own motion, a new trial has been granted* . . .

It is clear, that while the unemphasized portion of the statute is no more than a statement of the Constitutional Double Jeopardy Clause, the emphasized portion cannot withstand the holding of *Burks*, supra, 2150. That is, it cannot be meaningfully said that a person waives his constitutional right against being twice placed in jeopardy for

the same offense by asking the court for relief from a finding of guilt on legally insufficient evidence, even if the legal vehicle for such relief is termed a motion for new trial.

The Supreme Court in *Burks* reviewed the prior decisions of the Court that led to the misconception that a retrial could be granted upon a finding of insufficient evidence. The Court thereon stated that the prior cases:

> ". . . generally do not distinguish between reversals due to trial error and those resulting from evidentiary insufficiency. We believe, however, that the failure to make this distinction has contributed substantially to the present state of conceptual confusion existing in this area of the law." *Burks*, 2149.

The Court then went on to state:

> "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g. incorrect receipt of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a voted concern for insuring that the guilty are punished. . .
>
> *The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble.* Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been submitted to the jury. *Since we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on*

> *review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.*" (Emphasis added.) *Burks, supra,* 2149 and 2150.

In the case at bar, under the legal vehicle of a Motion for New Trial, the trial court reviewed the evidence and made a finding that:

> "In the present case, I heard the same evidence the jury did, I'm convinced that there was *no evidence, certainly not evidence beyond a reasonable doubt,* to sustain the verdict of homicide committed by the defendant of this particular victim. (Motion for New Trial Tr. page 12, lines 20–25. Emphasis added).

This finding on review by the trial court is unmistakably and clearly based on legally insufficient evidence as distinguished from trial error, and as such, retrial is barred by the Double Jeopardy Clause of the United States Constitution and the second trial of petitioner for the same offense is a nullity.

There are, at first view, several factors distinguishing *Burks* from the case at bar: (1) in Burks, the holding of insufficient evidence occurs at the appellate level; (2) Burks is a Federal Case; and (3) in Burks, the Government's evidence rebutting the defendant's affirmative defense is found insufficient, not the evidence of the crime.

A discussion of each of these distinguishing factors is in order here:

First, in the *Burks* case, the defendant was found guilty by the jury as charged by the state. "Thereafter, he filed a timely motion for a new trial, maintaining among other things 'that the evidence was insufficient to support the verdict'". *Burks, supra,* 2143. This motion was denied by the District Court. However, the Court of Appeals agreed with *Burks* claim that the evidence was insufficient to support the verdict and reversed the conviction. In the case at bar, the jury returned a verdict of guilty as charged. The petitioner filed a timely Motion for New Trial, maintaining among other things that the verdict was contrary to the evidence. On review by the trial judge, this motion was granted. The State of Louisiana appealed

the trial court's finding of insufficient evidence to the Louisiana Supreme Court; that Court upheld the trial judge's decision. *State* v. *Hudson*, Louisiana, 344 So. 2d, 1 (1977).

In each case, the state had rested, and the jury had returned its verdict. It cannot be contended, in either case, that at the hearing on the Motion for New Trial, the state could have reopened its case for new evidence—the jury had been sworn to try the cause and discharged. Jeopardy had definitely attached. See *State* v. *Daigle*, Louisiana, 344 So. 2d, 1380; *Crist* v. *Bretz*, 437 U.S. ___, 98 S. Ct. 2156, 57 L. Ed. 2d, ___ (1978). The exclusive conclusion is that in either instance, whether the evidence were found legally insufficient on review by the trial judge at the motion for new trial or on review by the appellate court, the result is that in order to afford the State a chance to muster new evidence, a *re*trial of the same defendant for the same offense is required—such a *re*trial is prohibited by the Fifth Amendment Double Jeopardy Clause.

Can it logically be said that a case *can* be retried when a motion for new trial is sustained by reason of legally insufficient evidence; but *cannot* be retried when an appellate court rules that the motion for new trial should have been sustained for the same reason?

The *second* possible distinguishing factor that *Burks* is a Federal case is of no avail; if one were merely applying federal *procedural* law, *Burks* would have no application to the instant case; however, the *Burks* holding is of *substantive U.S. Constitutional Law, clearly binding on the States* through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d, 707 (1969). See also the recent case of *Crist* v. *Bretz*, *supra*, which goes so far as to hold that the rule that jeopardy attaches when the jury is empaneled and sworn is applicable to the states.

The *third* possible distinguishing factor is the factual difference between *Burks* and the instant case. Admittedly, the *Burks* decision is made on what appears to be an erroneous finding of legally insufficient evidence; how-

ever, the U.S. Supreme Court resolves that issue by simply stating that the United States failed to cross-petition on the question of whether or not the Court of Appeals was correct in its holding of legally insufficient evidence. The Court then states:

> "Accordingly, that issue is not open for review here. Given this posture, we are squarely presented with the question of whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury." *Burks, supra*, 2144.

Hence, if the factual difference is of any consequence, it is favorable to the petitioner herein; inasmuch as by comparison, in *Burks* the holding of insufficient evidence is possibly erroneous, but was not appealed by the United States; however, in the instant case, the holding of insufficient evidence is clear, was appealed by the State and was upheld by the Louisiana Supreme Court.

It should be noted also, that the *only* relief afforded a defendant who has been convicted by a jury on legally insufficient evidence, is to apply for a new trial. Since the Amendment to the Louisiana Code of Criminal Procedure, Article 778, eliminated Motions for a Directed Verdict or Motions for Acquittal in jury cases, the Louisiana Law provides no procedural vehicle for presenting the question of legally insufficient evidence to the court, except by a motion for a new trial *after* conviction. This type of forced waiver of double jeopardy rights is exactly what was held unconstitutional in the *Burks* decision.

Failure to Plead Former Jeopardy Prior to Second Trial is not Waiver: Since, One, a Plea of Double Jeopardy may be raised at Any Time; and, Two, The Plea Would Have Been of No Avail Under Then Existing Louisiana Law.

Petitioner's plea of double jeopardy is timely raised by the instant Writ of Habeas Corpus since double jeopardy may be raised at any time under Louisiana Law. La. Code Crim. Pro. Ann., Art. 594; *State* v. *Smith*, Louisiana, 323 So. 2d, 797 (1975). La. Code Crim Pro. Ann., Art. 362 (6).

Moreover, the U.S. Supreme Court has held that failure

to object to a practice which a state had long allowed cannot strip a defendant of his right to attack the practice following invalidation by the Supreme Court. See *O'Connor* v. *Ohio*, 385 U.S. 92, 87 S. Ct. 252, 17 L. Ed 2d, 189 (1966). Specifically, the U.S. Supreme Court in *Griffin* v. *California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d, 106 (1965), held it error for the court to instruct on or for the prosecuting attorney to comment on a defendant's failure to testify. At the time of the *Griffin* ruling the constitutions of California and of Ohio required an instruction that the defendant did not have to testify and that failure to do so could not be held against him. O'Connor had failed to object to the prosecutor's comment on O'Connor's failure to testify because at the time of trial, the prosecutor's comment was permitted by Ohio law. O'Connor had exhausted his appeals in the Ohio courts and was seeking direct review at the U.S. Supreme Court when the *Griffin* case was handed down. The U.S. Supreme Court thus reasoned in O'Connor, at 191, that ". . .failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." and the Court therein stated: "We hold that in these circumstances, the failure to object in the state courts cannot bar the petitioner from asserting his federal right."

In the *Griffin* and *O'Connor* cases, the Court was addressing the Fifth Amendment privilege against self-incrimination; in the *Burks* case, the Court addresses the Fifth Amendment privilege against being twice placed in jeopardy for the same offense. Prior to *Griffin* and *O'Connor*, it had long been the practice of Ohio to allow prosecutor comment on the defendant's failure to testify; prior to Burks, it has long been the practice of Louisiana and other states to allow the State a second chance to muster sufficient evidence in a retrial if the defendant had successfully moved for a new trial by reason of insufficient evidence. Thus petitioner's failure to plead former jeopardy prior to his second trial in this cause should not strip him of his right to raise double jeopardy in this Writ of Habeas Corpus.

It should be further noted that even if prospective, application is given the holding in *Burks* as it was given the holding in *Griffin*, the petitioner herein is still not barred since the *Burks* decision was handed down while petitioner was seeking appellate review before the Supreme Court of Louisiana, and, hence, his case had not become final.

CONCLUSION

Petitioner, Tracy Lee Hudson, timely presented to the District Court the only remedy available to him at the conclusion of his first trial, raising the issue of the legal insufficiency of the State's evidence. The District Court held specifically that the evidence was insufficient to sustain a conviction. Petitioner, Tracy Lee Hudson, was subsequently for the second time placed in jeopardy for exactly the same offense. According to the clear and unambiguous decision of the U.S. Supreme Court in *Burks, supra*, as a matter of *substantive constitutional law*, petitioner's second trial was in direct violation of the prohibition against double jeopardy in the Fifth Amendment to the Constitution of the United States.

Petitioner's original Motion for a New Trial following his first trial, did not waive his right to plead double jeopardy, and petitioner's plea of double jeopardy by the instant Writ of Habeas Corpus was timely presented under Louisiana Law and under the U.S. Supreme Court decisions.

It is respectfully submitted that the petitioner's second trial was a nullity and petitioner's release from custody resulting therefrom must be ordered forthwith.

Respectfully Submitted,

TWENTY-SIXTH JUDICIAL DISTRICT INDIGENT DEFENDER OFFICE

S. PATRICK PHILLIPS
Chief Assistant Indigent Defender
405 Bossier Parish Courthouse
Benton, Louisiana 71006

PRAYER

WHEREFORE, PETITIONER PRAYS that writs of certiorari be granted in this cause; that this Court will bring the record up, and that after due proceedings had, order the release of petitioner, Tracy Lee Hudson.

STATE OF LOUISIANA
PARISH OF BOSSIER

VERIFICATION

BEFORE ME, the undersigned authority, a Notary Public duly commissioned and qualified in accordance with law in and for the State and Parish aforesaid, personally came and appeared: S. PATRICK PHILLIPS, Chief Assistant Indigent Defender, Twenty-Sixth Judicial District Indigent Defender Board, who, after having been first duly sworn, deposed and stated that:

1. He is of counsel for petitioner in these proceedings;
2. All of the allegations contained in the above and foregoing application for Writs are true and correct to the best of his knowledge, information and belief;
3. A copy of this application has been served on the Honorable Cecil C. Lowe, Judge of the Twenty-Sixth Judicial District Court of Louisiana, and on Honorable District Attorney, Henry N. Brown, Jr., in and for the Twenty-Sixth Judicial District of Louisiana, prior to filing of same in the Supreme Court of Louisiana, by personally handing each of them a copy hereof;
4. All of the documents attached hereto and filed herewith are true and correct copies of the original documents filed in the record herein.

S. PATRICK PHILLIPS
Chief Assistant Indigent Defender

SWORN AND SUBSCRIBED before me, Notary, this 16th day of November, 1978.

RUTH V. STRONG
Notary Public

SUPREME COURT OF LOUISIANA

No. 63,450

STATE OF LOUISIANA

v.

TRACY LEE HUDSON

ON WRIT OF CERTIORARI TO THE TWENTY-SIXTH JUDICIAL DISTRICT COURT, PARISH OF BOSSIER, HONORABLE CECIL C. LOWE, JUDGE.

* * * * *

BLANCHE, Justice.

The issue presented is whether the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's guilty verdict has been set aside and a new trial ordered pursuant to LSA-C.Cr.P. art. 851 solely for lack of sufficient evidence to sustain the jury's verdict.

Petitioner, Tracy Lee Hudson, was convicted by a jury of first degree murder, LSA-R.S. 14:30, and sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. Pursuant to his duty to pass upon the sufficiency of the evidence, *State v. Daspit*, 167 La. 53, 118 So.690 (1928); LSA-C.Cr.P. art. 851, Official Revision Comment (d); the trial judge granted petitioner's motion for a new trial upon finding insufficient evidence to support the verdict returned by the jury.[1] The granting or the refusal to grant a new trial is unreviewable by this Court, except for error of law. LSA-C.Cr.P. art. 858. Accordingly, the State's application for review erroneously asserting that the district court may pass only upon whether there is "some evidence" was denied. 344 So.2d 1 (La. 1977) Upon retrial the State introduced additional evidence, in particular an eye witness to the murder

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[1] In his Oral Reasons for Judgment, the trial judge stated:

> "In the present case, I heard the same evidence the jury did, I'm convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of homicide committed by the defendant of this particular victim."

who had not been produced at the original trial. The petitioner was convicted by a jury of first degree murder for the second time and resentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. On appeal, the conviction and sentence were affirmed. 361 So.2d 858 (La. 1978)

On October 2, 1978, petitioner applied for habeas corpus relief in the district court, alleging for the first time that the second trial in this case placed him in jeopardy a second time for the same offense in violation of the double jeopardy clause of the Fifth Amendment. The trial court denied relief, and petitioner applied to this Court. We granted petitioner's application to consider his plea of double jeopardy.

In *Burks v. United States*, ___ U.S. ___, 98 S.Ct. 2141, 57 L.Ed2d 1 (1978), the United States Supreme Court announced that the double jeopardy clause of the Fifth Amendment precluded a second trial when a defendant's conviction is reversed by a reviewing court solely for lack of sufficient evidence to sustain the jury's verdict. In *Burks*, the defendant was convicted of bank robbery in federal district court and the trial judge denied his motion for new trial. On appeal, the defendant claimed that he had successfully established a prima facie defense of insanity through the testimony of three expert witnesses and the Government had failed to meet its burden of coming forward and proving sanity beyond a reasonable doubt. The Supreme Court observed:

> ". . . [T]he reviewing court went on to hold that the United States had not fulfilled its burden since the prosecution's evidence with respect to Burks' mental condition, even when viewed in the light most favorable to the Government, did not "effectively rebut' petitioner's proof with respect to insanity and criminal responsibility. In particular, *the witnesses presented by the prosectution failed to 'express definite opinions on the precise questions which this court* [of appeals] has identified as critical in cases involving the issue of [in]sanity.' " (98 S.Ct. at 2143—Emphasis added)

The court of appeal remanded the case to the district court, directing that court to enter a verdict of acquittal unless the State was able to present sufficient additional evidence to carry its burden. The defendant sought relief on double jeopardy grounds.

The Supreme Court in *Burks* held that a second trial would normally be permitted after a conviction had been reversed due to trial error, but that the double jeopardy clause prohibited a second trial after a conviction had been reversed due to failure of proof. The Court explained the rationale for this distinction as follows:

> ". . . In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. See Note Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 31 U.Chi.L. Rev. 365, 370 (1964).
>
> "The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. . . . Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." (98 S.Ct. at 2149-2150)

In precluding a second trial when a defendant's conviction has been overturned due to failure of proof at trial, the high court expressly declined to follow prior jurisprudence which found a "waiver" of the double jeopardy guarantee whenever the defendant sought a new trial as one of his remedies in the trial court:

> "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial. . . . To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled." (98 S.Ct. at 2150)

The double jeopardy protection of the Fifth Amendment is applicable to state criminal proceedings through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed2d 707 (1969); *State v. Thompson*, 366 So.2d 1291 (La. 1978).

While the case at bar involves the granting of a motion for new trial by the trial court for insufficient evidence rather than review at the appellate level, we deem the same principles are applicable to both.

LSA-C.Cr.P. art. 851 provides:

> "The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> "The court, on motion of the defendant, shall grant a new trial whenever:
>
> "(1) The verdict is contrary to the law and the evidence . . . ."

This provision permits the trial judge to grant a defendant a new trial if, in his opinion, the evidence is insufficient to convict. *State v. Rollins*, 351 So.2d 470 (La. 1977); *State v. Jack*, 332 So.2d 464 (La. 1976); *State v. Jones*, 288 So.2d 48 (La. 1974). This Court's appellate jurisdiction in

criminal matters extends only to questions of law, LSA-Const. Art. 5, § 5 (c), and it is only where a defendant has moved for a judgment of acquittal in a trial before a judge alone (LSA-C.Cr.P. art. 778) or for a new trial based upon the contention that there is *no evidence at all* of the crime charged or an essential element thereof, is a question of law presented which this Court can review. *State v. Cobbs*, 350 So.2d 168 (La.1977); *State v. Blacksline*, 347 So.2d 193 (La.1977); *State v. Jamerson*, 341 So.2d 1118 (La.1977).

This Court has recognized that when it finds on review that in a prior trial there was *no evidence* of the crime charged or an essential element thereof, *Burks* precludes retrial, and a verdict of acquittal must be entered. *State v. Thompson*, 366 So.2d 1291 (La.1978); *State v. Allien*, 366 So.2d 1308 (La.1978); State v. Liggett, 363 So.2d 1184 (La.1978). In *State v. Thompson, supra*, we noted that the Supreme Court indicated that the contention that there was *no evidence* of the crime charged or an essential element thereof may properly be raised solely by a motion for new trial. *State v. Thompson, supra* at 1293-94. Thus, if a trial judge granted a motion for new trial on the grounds that *no evidence* of the crime charged or an essential element thereof, *Burks, supra*, and our holding in *Thompson, supra*, would require the trial judge to enter a verdict of acquittal.

The question in the instant case is whether *Burks* compels the same result where the trial judge grants a motion for new trial on the grounds of *insufficient evidence* as opposed to granting the motion on the grounds of *no evidence*. We believe it does not.

We believe the holding in *Burks* was addressed solely to those cases where a reviewing court (whether it be the trial judge or an appellate court) finds that as a *matter* of *law* there was a failure of proof at the trial level. The Court, in *Burks*, explained:

> "The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosectution cannot com-

> plain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. . . . *Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been submitted to the jury.*" (98 S.Ct. at 2149–2150—Emphasis added)

Interpreting this language in light of this State's rules regarding appellate review of evidence presented in criminal matters, we believe the holding in *Burks* (precluding a second trial) is limited to those cases where, *as a matter of law*, a reviewing court has determined that in a prior trial there was *no evidence* of the crime charged or an essential element thereof.

We are buttressed in this conclusion by what we feel was an attempt by the Court to narrow its holding in *Burks:*

> ". . . The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury finding the defendant guilty beyond a reasonable doubt. [Citations omitted] . . . While this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, it is apparent that such a decision will be confined to cases where the prosecution's failure is clear. . . ." (98 S.Ct. at 2150)

Because the trial judge herein ordered a new trial pursuant to LSA-C.Cr.P. art. 851 (1) solely for lack of *sufficient evidence* to sustain the jury's verdict (a factual determination entrusted exclusively to the trial judge under our law and jurisprudence), we hold that retrial of the defendant was not precluded by the double jeopardy clause.

DECREE

For the above and foregoing reasons, the judgment of the district court denying relator relief on his habeas corpus application is affirmed.

AFFIRMED.

SUPREME COURT OF LOUISIANA

No. 63,450

STATE OF LOUISIANA

v.

TRACY LEE HUDSON

* * * * *

CONCURRING OPTION

TATE, Justice.

I fully concur in the holding of the majority.

Although Burks v. United States, ___ U.S. ___, 98 S.Ct. 2141 (1978), has language that without close analysis seems to require upholding the double jeopardy plea, in my opinion the majority has correctly concluded that its rationale and holding are not applicable to the present situation.

Here, the record of the first trial shows that the state produced evidence sufficient to present the jury the question of the defendant's guilt of the crime. We would not have held, on appeal, that the evidence in that record was so insufficient as to constitute no evidence of the crime, so as to justify our setting aside the verdict of guilty.

Nevertheless, the trial judge was not completely satisfied that the accused's guilt was proved beyond a reasonable doubt. He did *not* grant a new trial for a reason that he did not think the state had produced *sufficient* evidence to prove guilt, but rather because he himself (to satisfy *his* doubts—not the jury's which had concluded otherwise) had personal doubts that the evidence was sufficient to prove guilt beyond a reasonable doubt. Commendably and conscientiously, he therefore ordered a new trial; otherwise, the sufficiency of the evidence would not have been reviewable by this court, despite his own doubts that the defendant's guilt was sufficiently proved.

The present is not an instance where the state did not prove its case at the first trial, so that granting a new trial gave the state a *second* chance to produce enough evi-

dence to convict the accused. If so, as the majority notes, re-trial offends constitutional double jeopardy.

Rather, this is an instance where the state produced enough evidence to convict the accused at the first trial, but nevertheless the conscientious trial judge was troubled by a doubt concerning the defendant's actual guilt. In ordering the new trial, he did so to protect the accused (his denial of the new trial would have been unreviewable under our jurisprudence, since "some" evidence sufficient to support a verdict of guilt had been introduced).

In reality, the trial judge's reason for granting the new trial is better expressed by his authorization to do so whenever "the court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right," La.C.Cr.P. art. 851(5). Under these circumstances, I do not believe that *Burks* requires us to hold that double jeopardy is occasioned by a new trial granted for such reason.

I therefore respectfully concur.

SUPREME COURT OF LOUISIANA

No. 63,450

STATE OF LOUISIANA

v.

TRACY LEE HUDSON

DENNIS, Justice, dissenting.

I respectfully dissent.

Although the Supreme Court in Burks v. United States, ___ U.S. ___, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) was not confronted with a case in the exact posture as the instant proceeding it is clear that the constitutional principles expounded there are applicable here. The high court flatly stated that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Id., 98 S.Ct. at 2147, 57 L.Ed.2d at 9. The Court's opinion provides no basis for limiting its holding to cases in which a reviewing court has set aside a conviction for evidentiary insufficiency. On the contrary, the Court supported its decision by pointing out that reversal for insufficient evidence should be treated the same whether made by the trial court or the reviewing court:

> "[I]t should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient . . . . To hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court." *Id.*, 98 S.Ct. at 2147, 57 L.Ed.2d at 9.

Moreover, in a companion case, United States v. Scott, ___ U.S. ___, 98 S.Ct. 2187, 2196–97, 57 L.Ed.2d 65, 77–78 (1978), the Supreme Court made it clear that the question of whether a trial court's ruling is to be treated as an acquittal for purposes of double jeopardy is not to be determined by the judge's own characterization of his ac-

tion. The Court in *Scott* relied on United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), in which the Court made the following statement:

> "[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action. [citations omitted] Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."

Therefore, as I read *Burks*, *Scott* and *Martin Linen*, the double jeopardy clause has now been interpreted so as to prohibit a reprosecution of a defendant after a determination, by either a trial or appellate court, that the evidence introduced at trial was insufficient to sustain the verdict, regardless of the label placed on the motion and ruling by the defendant or the trial judge.

Additional support for this view may be found in the following language quoted with approval in the recent United States Supreme Court decision in Greene v. Massey, ___U.S.___, 98 S.Ct.___, 57 L.Ed.2d 15, 20 (1978):

> " 'Regardless of whether an appellate court or a trial jury makes the determination that the evidence is insufficient to sustain a finding of guilt as to a particular charge, and regardless of whether a petitioner moves for a new trial on other grounds in addition to asserting the ground of insufficiency of the evidence, it would seem that the double jeopardy clause would preclude giving the prosecution a second chance.' "

There appears to be no better reason for allowing the prosecution to retry such a case as the present one than there is to allow the prosecution, for example, to retry a defendant after discharging the jury upon discovering that it has insufficient evidence because of the absence of witnesses. *See* Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1965); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931).

Although it is not stated explicitly in any of the Supreme Court's recent opinions, their total effect appar-

ently eliminates the possibility that a defendant may merely be granted a new trial upon a finding of evidentiary insufficiency and requires that a judgment of acquittal be entered instead. This result appears, moreover, to be consistent with the purpose underlying the prohibition against double jeopardy, as stated, for example, by the Supreme Court in Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Id., 355 U.S. 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199.

For the foregoing reasons, defendant's conviction should be reversed and set aside and the defendant ordered discharged.

SUPREME COURT STATE OF LOUISIANA

No. 63,450

STATE OF LOUISIANA

v.

TRACY LEE HUDSON

APPLICATION FOR REHEARING

NOW INTO COURT through undersigned counsel comes and appears TRACY LEE HUDSON, who with respect represents:

1.

Tracy Lee Hudson filed a Writ of Habeas Corpus alleging Double Jeopardy, which application was denied by the 26th Judicial District Court.

2.

This Court granted Writs of Certiorari; and after hearing, affirmed the lower Court's decision.

3.

This Court found as a fact, in its opinion, that following defendant's original conviction of first degree murder, "the trial Judge granted petitioner's motion for a new trial upon finding *insufficient evidence to support the verdict returned by the jury*" (emphasis added).

4.

Quoting *Burks vs. U.S. 98 S.Ct. 2141 (1978)*, this Court recognized the U.S. Constitution principle enunciated therein as follows: "The Fifth Amendment precluded a second trial when a defendant's conviction is reversed by a reviewing Court solely for *lack of sufficient evidence to sustain the jury's verdict.* (emphasis added).

5.

This Court then held that "in light of this State's rules regarding appellate review of evidence presented in criminal matters;" that the *Burks* case was not applicable.

6.

This Court reached this conclusion notwithstanding the specific and unequivocal holding of the trial Court as follows: "I'm convinced that there was *no evidence* . . . to sustain the verdict of homicide committed by the defendant of this particular victim."

7.

The decision of this Court of June 25, 1979 does violence to the U.S. Constitutional rights guaranteed petitioner by the Fifth Amendment to the U.S. Constitution as enunciated in *Burks*.

8.

Petitioner submits that the Court's opinion of June 25, 1979 is neither legally sound nor logically consistent, and respectfully requests that a rehearing be granted herein.

9.

Counsel for petitioner was engaged in a criminal jury trial during June 25, 1979 through June 29, 1979, inclusive, and has not had sufficient time to prepare an adequate brief herein.

10.

This Court's decision of June 25, 1979 was based on an issue not anticipated as material by either the State or the defense herein, and was not adequately briefed on the original hearing herein.

11.

Petitioner desires an additional thirty (30) days within which to file a brief in support of this application for rehearing.

WHEREFORE PETITIONER PRAYS that he be granted an additional thirty (30) days from this date to file a brief in support of the application for rehearing, and that he be granted a rehearing on his application for Writs of Habeas Corpus.

S. PATRICK PHILLIPS
Chief Asst. Indigent Defender
405 Bossier Parish Court House
Benton, Louisiana

CERTIFICATE OF SERVICE (omitted in printing)

SUPREME COURT OF LOUISIANA

No. 63,450

STATE OF LOUISIANA

vs

TRACY LEE HUDSON

ON WRIT OF CERTIORARI TO THE
TWENTY-SIXTH JUDICIAL DISTRICT COURT
PARISH OF BOSSIER
HONORABLE CECIL C. LOWE, JUDGE

On Application for Rehearing

Denied.

FWS
AT JR
WFM
FAB

Dixon, Calogero and Denis J.J., would grant a rehearing.

Supreme Court of the United States

No. 79-5688

TRACY LEE HUDSON,

Petitioner,

v.

LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Louisiana.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 14, 1980

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